

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

4 PAUL SCOTT KLEIN,)
5 Plaintiff,)
6 vs.)
7 CLARK COUNTY SCHOOL)
8 DISTRICT, et al.,)
9 Defendants.)

) 3:08-CV-00191-ECR (VPC)
REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE
November 13, 2008

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This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's "motion for a restraining order prohibiting defendants from depriving plaintiff of his access to courts rights" (#20), and plaintiff's supplement to this motion (#33). Defendant opposed both motions (#36 and #47). Plaintiff did not reply to either opposition. For the reasons stated below, the court recommends that plaintiff's motions (#20 and #33) be denied.

I. HISTORY AND PROCEDURAL BACKGROUND

18 Plaintiff Paul Scott Klein (“plaintiff”), a *pro se* prisoner, is currently incarcerated by the
19 Nevada Department of Corrections (“NDOC”) at Southern Desert Correctional Center (“SDCC”)
20 (#27). Plaintiff brought his original action pursuant to 42 U.S.C. § 1983, alleging that prison
21 officials violated his First Amendment right to free speech, his Eighth Amendment right against
22 cruel and unusual punishment, and his Fourteenth Amendment rights to equal protection and due
23 process while he was incarcerated at SDCC. *Id.* p. 9-49. Plaintiff also brings numerous state tort
24 claims, including assault, battery, sexual harassment, coercion of witnesses, witness tampering,
25 obstruction of justice, negligent release of confidential information about plaintiff, intentional
26 interference with plaintiff’s interest in seclusion, false light, intentional infliction of emotional
27 distress, and intentional deprivation of plaintiff’s civil rights. *Id.* Plaintiff names as defendants
28 Reid Kimoto, principal of the Southern Desert Correctional Adult High School; Brian Williams,

1 SDCC warden, Cheryl Burson, SDCC associate warden; Jeffrey Patterson, SDCC associate
 2 warden; Lavert Taylor, Chaplain at SDCC; Vincent Hain, Michael Maxfield, and Maryann
 3 Marsh, caseworkers at SDCC; Howard Skolnik, NDOC director; Leo Vath, maintenance worker
 4 at SDCC, Anthony Digiralamo, maintenance supervisor at SDCC; Paul Wheelock; David
 5 Grusman; Fred Tocco, former shop manager at SDCC, and Eric Burson, Roy Plumlee, William
 6 Shubert, James Figueroa, James Brill, David Magnum, Gina Hain, and Tracy Dory, correctional
 officers at SDCC

7 Plaintiff filed this motion for a temporary restraining order on July 24, 2008, and its
 8 supplement on August 4, 2008. In his original TRO motion, which was written on toilet paper,
 9 plaintiff alleges that defendants have confiscated all of his legal papers, books, and office supplies
 10 in retaliation for his filing of the instant lawsuit, and that defendants are therefore restricting his
 11 access to court, and requests the court to order defendants to return plaintiff's legal materials and
 12 pens (#20). In his supplement, alleges that defendants are planning to transfer him to Ely State
 13 Prison, which is at an elevation of over 6,000 feet, even though it is detrimental to plaintiff's
 14 health to be housed at an elevation over 4,000 feet (#33). Plaintiff requests that the court grant
 15 "a further TRO prohibiting Defendants from having Plaintiff transferred to any prison above 4000
 16 feet in elevation." *Id.*, p. 3.

17 The court notes that plaintiff is proceeding *in pro se*. "In civil cases where the plaintiff
 18 appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit
 19 of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988);
 20 *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

21 II. DISCUSSION & ANALYSIS

22 A. Discussion

23 1. Preliminary Injunction

24 The Prison Litigation Reform Act ("PLRA") states that

25 In any civil action with respect to prison conditions, to the extent
 26 otherwise authorized by law, the court may enter a temporary
 27 restraining order or an order for preliminary injunctive relief.
 28 Preliminary injunctive relief must be narrowly drawn, extend no
 further than necessary to correct the harm the court finds requires
 preliminary relief, and be the least intrusive means necessary to

1 correct that harm. The court shall give substantial weight to any
 2 adverse impact on public safety or the operation of a criminal
 3 justice system caused by the preliminary relief... .

4 18 U.S.C. § 3626(2).

5 The traditional equitable criteria for granting a preliminary injunction in the Ninth Circuit
 6 are: “(1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to
 7 the plaintiff if the preliminary relief is not granted; (3) a balance of hardships favoring the
 8 plaintiff, and (4) advancement of the public interest (in certain cases).” *Johnson v. California*
 9 *State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995); *Clear Channel Outdoor, Inc. v.*
 10 *City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). Alternatively, the moving party may
 11 demonstrate *either* a combination of probable success on the merits and the possibility of
 12 irreparable injury *or* that serious questions going to the merits were raised and the balance of
 13 hardships tips sharply in his or her favor. *Johnson*, 72 F.3d at 1430 (emphasis added); *see also*
 14 *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1298 (9th Cir. 2003). The Ninth
 15 Circuit has stated that these alternatives represent “extremes of a single continuum” rather than
 16 two separate tests and thus, the “greater the relative hardship to [the party seeking the preliminary
 17 injunction,] the less probability of success must be shown.” *Clear Channel*, 340 F.3d at 813.
 18 A prohibitory injunction preserves the status quo while litigation is pending, while a mandatory
 19 injunction provides preliminary relief well beyond maintaining that status quo. *Stanley v.*
 20 *University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994). Mandatory preliminary
 21 injunctions are disfavored, and “the district court should deny such relief ‘unless the facts and law
 22 clearly favor the moving party.’” *Id.* (quoting *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th
 23 Cir. 1976). The “granting or withholding of a preliminary injunction rests in the sound judicial
 24 discretion of the trial court.” *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 325 F.2d 141, 143 (9th
 25 Cir. 1964).

26 **2. Temporary restraining order**

27 The standard for issuing a temporary restraining order is identical to the standard for
 28 preliminary injunction. *Brown Jordan Intern., Inc., v. Mind's Eye*, 236 F. Supp.2d 1152, 1154
 (D. Haw. 2002). Moreover, it is appropriate to treat a non-*ex parte* motion for a temporary

1 restraining order and preliminary injunction as a motion for a preliminary injunction. *See* 11A
 2 Charles A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE CIV. 2d § 2951 (2007) (“When
 3 the opposing party actually receives notice of the application for a restraining order, the procedure
 4 that is followed does not differ functionally from that on an application for a preliminary
 5 injunction and the proceeding is not subject to any special requirements.”).

6 **3. Mootness**

7 “Article III of the Constitution limits federal courts to the adjudication of actual, ongoing
 8 controversies between litigants.” *Deakins v. Monaghan*, 484 U.S. 193, 199, 108 S.Ct. 523, 528
 9 (1988). “Mootness is a jurisdictional issue, and ‘federal courts have no jurisdiction to hear a case
 10 that is moot, that is, where no actual or live controversy exists.’” *Foster v. Carson*, 347 f.3d 732,
 11 745 (9th Cir. 2003), quoting *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th cir. 1999).
 12 “If there is no longer a possibility that [a litigant] can obtain relief for his claim, that claim is
 13 moot and must be dismissed for lack of jurisdiction.” *Id.*, quoting *Ruvalcaba v. City of Los
 14 Angeles*, 167 F.3d 514, 521 (9th Cir. 1999).

15 **B. Analysis**

16 As to plaintiff’s first motion for a TRO, defendants argue that the motion is moot because
 17 plaintiff’s legal files were returned to him, and plaintiff has admitted as much (#36, referring to
 18 #22, p. 5). As to plaintiff’s supplement to his motion for a TRO, defendants argue that plaintiff’s
 19 motion is moot because plaintiff is not being transferred to ESP, and that even if he were
 20 transferred, plaintiff’s motion should be denied because plaintiff has no constitutional right to be
 21 housed in a specific institution (#47, p. 3).

22 **1. Mootness**

23 Plaintiff’s first motion is brief. However, it appears that plaintiff requests that the court
 24 order defendants to return his legal materials (#20). Shortly after filing the instant motion,
 25 plaintiff filed two subsequent motions, one requesting that the court order defendants to
 26 “photograph and document the condition and status of plaintiff’s legal files and property seized
 27 and returned by defendants,” and one requesting an evidentiary hearing (#22). In these motions,
 28 plaintiff stated that defendants returned his property on July 18, two days after he sent his TRO

1 motion. However, plaintiff complained that at least sixteen pages of legal documentation were
 2 not returned. The court has previously ordered that plaintiff does not have a right to have these
 3 sixteen pages returned or copied because they contain the home addresses of NDOC personnel
 4 (#59, p.1). The court also found that plaintiff's access to the courts had not been frustrated in any
 5 way. *Id.* p. 2. All of plaintiff's other legal materials have been returned to him, making his motion
 6 moot. Therefore, plaintiff's motion for a restraining order is denied as moot.

7 Plaintiff's supplemental motion is not a true supplement to his first motion for a
 8 restraining order. Rather, it raises new issues unrelated to plaintiff's access to the court. In his
 9 supplement, plaintiff asks the court to enjoin defendants from transferring him to any facility over
 10 4,000 feet in elevation (#33). Plaintiff has chronic obstructive pulmonary disease and claims that
 11 his life expectancy will be reduced by fifty percent if he is housed over 4,000 feet. Plaintiff
 12 alleges that defendants are attempting to transfer him to Ely State Prison, which is at an elevation
 13 over 6,000 feet, in retaliation for his commencement of multiple cases. *Id.* p. 2-3. Plaintiff claims
 14 that such a transfer would "kill him by slow suffocation," and, therefore, requests the court grant
 15 an additional TRO to enjoin the defendants from transferring plaintiff to any facility over 4,000
 16 feet. Defendants argue that plaintiff is not being transferred, and his motion is therefore moot
 17 (#47). Defendants state that while plaintiff was initially approved for a transfer, he was removed
 18 from the transfer list because of medical concerns. *Id.* p. 3 and exh. A ("I/M was approved to be
 19 sent to ESP, but due to COPD, he was scratched by medical"). Based on the evidence presented
 20 by defendants (#47, exh. A), it is clear that defendants are no longer planning to transfer plaintiff.
 21 Therefore, plaintiff's supplemental motion is moot and as such, is denied.¹

22 **2. Temporary Restraining Order**

23 Even disregarding the mootness of plaintiff's motions, plaintiff has not met the
 24 preliminary injunction requirements. Plaintiff has not demonstrated a likelihood of success on the
 25 merits. Further, plaintiff has not shown irreparable injury because his legal materials have been

26
 27 ¹Defendants also assert that plaintiff has no constitutional right to be housed in a specific
 28 location, and therefore, the court cannot enjoin NDOC from transferring plaintiff. *Id.* p. 3-4. As the
 court has found that plaintiff's motion is moot and that plaintiff has not met the preliminary
 injunction standard, the court declines to address this argument.

1 returned and he is not being transferred. Therefore, plaintiff's motions are denied.

III. CONCLUSION

3 Based on the foregoing and for good cause appearing, the court concludes that plaintiff's
4 motion and supplemental motion for a restraining order are moot because plaintiff's legal materials
5 were returned and plaintiff is not being transferred. As such, the court recommends that plaintiff's
6 motions be **DENIED**.

7 The parties are advised:

8 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
9 the parties may file specific written objections to this report and recommendation within ten days
10 of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and
11 Recommendation” and should be accompanied by points and authorities for consideration by the
12 District Court.

13 2. This report and recommendation is not an appealable order and any notice of appeal
14 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
15 judgment.

IV. RECOMMENDATION

17 **IT IS THEREFORE RECOMMENDED** that plaintiff's motion for a restraining order
18 (#20) and its supplement (#33) be **DENIED**.

19 || DATED: November 14, 2008.

Valerie P. Cooke

UNITED STATES MAGISTRATE JUDGE
